Chandran a/l Sellapan v Puncak Permata Sdn Bhd (creditors voluntary liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1937 OF 2011

KN SEGARA, ABU SAMAH AND RAMLY ALI JJCA

1 DECEMBER 2011

Civil Procedure — Striking out — Action — Whether statement of claim failed to disclose cause of action against defendant — Whether plain and obvious case for striking out

The appellant claimed he had bought a piece of land ('the land') from a person named Tham and that he had paid the full purchase price for it. The transfer of the land into the appellant's name, however, could not be effected because of the existence of a private caveat and a registrar's caveat. The land was previously owned by the respondent and it was alleged by the latter that Tham had fraudulently transferred the land into his name using a forged instrument. In a separate suit against Tham, the respondent had obtained a default judgment ('the default judgment') to have the transfer of the land to him set aside and to register the land back into the respondent's name. The appellant intervened in that suit claiming he was a bona fide purchaser for value of the land and obtained orders to set aside the default judgment and to injunct the respondent from disposing of the land. Those orders were set aside by the Court of Appeal ('the appeal decision'). The appellant then sued the respondent, again for an order that the default judgment be set aside, that Tham be declared as holding the land as trustee for the appellant, that the latter was entitled to be registered as owner of the land and that the registrar of titles remove the caveats on the land to make the registration possible. The respondent applied to strike out the action on the ground no cause of action was disclosed against it in the appellant's pleadings. The High Court allowed the application holding, inter alia, that (i) no privity or legal relationship between the appellant and the respondent had been shown (ii) the appeal decision effectively affirmed the respondent as the legal and beneficial owner of the land (iii) the appellant's cause of action, if any, lay against Tham and not against the respondent (iv) the appellant was barred by res judicata and issue estoppel from seeking substantially the same order that the Court of Appeal refused to grant (v) Tham could not convey title to the land to the appellant as he himself had become the registered owner thereof by fraudulent means and (vi) the appellant was not a bona fide purchaser for value. The appellant appealed the decision to the Court of Appeal.

Held, dismissing the appeal with costs and affirming the High Court's decision:

(1) It was patent from the appellant's pleadings that no cause of action was disclosed against the respondent over the land in question. The claim was clearly unsustainable and bound to fail. The appellant's cause of action, if any, was against Tham with whom he, according to his pleadings, had entered into an agreement for the sale of the land (see para 9).

(2) It was imperative for the appellant to have made Tham a co-defendant in the action. Since he intentionally elected not to make Tham a party to the action, his claim to be a bona fide purchaser of the land rang hollow and unbelievable (see paras 11–12).

(3) The High Court had not erred in fact or in law in striking out the appellant's claim (see para 15).

[Bahasa Malaysia summary

Perayu mendakwa yang dia membeli sebidang tanah ('tanah') daripada seorang yang bernama Tham dan bahawa dia telah membayar penuh harga belian untuknya. Pemindahan tanah tersebut kepada nama perayu, walau bagaimanapun tidak boleh dibuat kerana wujudnya kaveat persendirian dan kaveat pendaftar. Tanah tersebut terdahulunya dimiliki oleh responden dan ia didakwa oleh responden bahawa Tham telah secara palsu memindahkan tanah tersebut kepada namanya dengan menggunakan instrumen palsu. Dalam tindakan berlainan terhadap Tham, responden telah memperolehi penghakiman ingkar ('penghakiman ingkar') untuk memindahkan tanah tersebut kepadanya diketepikan dan mendaftar kembali tanah tersebut kepada nama responden. Perayu campur tangan dalam tindakan tersebut dengan mendakwa bahawa dia adalah pembeli bona fide untuk nilai tanah tersebut dan memperolehi perintah-perintah untuk mengetepikan penghakiman ingkar dan untuk menghalang responden daripada menjual tanah tersebut. Perintah-perintah tersebut diketepikan oleh Mahkamah Rayuan ('keputusan rayuan'). Perayu kemudiannya menyaman responden, sekali lagi untuk perintah bahawa penghakiman ingkar diketepikan, bahawa Tham diisytiharkan sebagai memegang tanah tersebut sebagai pemegang amanah untuk perayu, bahawa perayu berhak didaftarkan sebagai pemilik tanah tersebut dan bahawa pendaftar hak milik memotong kaveat ke atas tanah tersebut untuk memungkinkan pendaftaran. Responden memohon untuk membatalkan tindakan atas alasan tiada kausa tindakan dikemukakan terhadapnya dalam pliding perayu. Mahkamah Tinggi membenarkan permohonan tersebut dengan memutuskan, antara lain, bahawa (i) tiada priviti atau hubungan sah antara perayu dan responden telah ditunjukkan (ii) keputusan rayuan secara efektif mengesahkan responden sebagai pemilik sah dan benefisial tanah tersebut (iii) kausa tindakan perayu, jika ada, diletakkan terhadap Tham dan bukan terhadap responden (iv) perayu dihalang oleh res

judicata dan isu estopel daripada memohon secara ketara perintah yang sama yang ditolak Mahkamah Rayuan daripada memberikan (v) Tham tidak dapat memindahkan hak milik tanah tersebut kepada perayu kerana dirinya sendiri telah menjadi pemilik berdaftar secara pemalsuan dan (vi) perayu bukan pembeli bona fide untuk nilai. Perayu merayu keputusan tersebut kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Adalah cara daripada pliding perayu bahawa tiada kausa tindakan dikemukakan terhadap responden ke atas tanah yang dipersoalkan. Dakwaan tersebut jelas tidak dapat dikekalkan dan akan gagal. Kausa tindakan perayu, jika ada, adalah terhadap Tham dengan siapa yang dia mengikut plidingnya, telah memasuki perjanjian untuk jualan tanah tersebut (lihat perenggan 9).

(2) Adalah imperatif untuk membuatkan Tham sebagai defendan bersama di dalam tindakan tersebut. Memandangkan dia sengaja memilih untuk tidak membuat Tham pihak kepada tindakan tersebut, dakwaannya sebagai pembeli bona fide tanah tersebut tidak bererti dan tidak boleh dipercayai (lihat perenggan 11–12).

(3) Mahkamah Tinggi tidak tersilap dari segi fakta atau undang-undang dalam membatalkan tuntutan perayu (lihat perenggan 15).]

Notes

For cases on action, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7926–7978.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)

Appeal from: Civil Suit No 22–432 of 2010 (High Court, Kuala Lumpur)

C K Yeoh (Ranjit Singh & Yeoh) for the appellant.
Nad Segaram (Kavitha Karuppannan with him) (Shearn Delamore & Co) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The appellant's ('plaintiff's') claim against the respondent ('defendant') was struck out by the High Court judge ('HCJ') on an application by the defendant under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC').

[2] We dismissed the plaintiff's appeal and affirmed the decision of the HCJ.

There were no merits in the appeal before us. The plaintiff's claim against the defendant was clearly unsustainable and bound to fail on the pleadings, as it disclosed no cause of action against the defendant. The plaintiff commenced an action only against the defendant and cited no other parties as defendants. The plaintiff had filed no separate claim against any other party and in particular one Tham Weng Hong. This civil suit was filed on 13 May 2010.

[3] The subject matter of the plaintiff's claim is a piece of land known as HS(D) 49071, PT 48663, Mukim and District of Kuala Lumpur ('the land') that was purportedly transferred from the defendant and registered in the name of one Tham Weng Hong ('Tham') on 10 September 2004.

[4] The plaintiff alleges that by an agreement in writing dated 11 October 2004 ('the agreement'), Tham agreed to sell and the plaintiff agreed to purchase the land for a consideration of RM1,500,000 and, that on or about 17 January 2005 the plaintiff had paid the full purchase consideration to Tham. The plaintiff had not lodged any private caveat to lend credence to the purported transaction with Tham and to protect his interest, either immediately after the purported agreement was entered with Tham, in 1994, or immediately, upon the alleged full consideration was paid to Tham, on 17 January 2005.

[5] Tham has not been made a party in this action by the plaintiff. However, the plaintiff asserts, in the statement of claim that, on or about 15 February 2005, the relevant documents for the transfer of the land were presented to the land office vide Presentation No 1815/2002.

[6] The plaintiff asserts that, by letter dated 23 April 2005, the land office rejected the documents presented for transfer as there were in existence a private caveat and a registrar's caveat on the land. It was only thereafter that the plaintiff, on or about 9 May 2005, lodged a private caveat.

[7] In paras 8.1, 8.2, 8.3, 9, 10 and 11 of the statement of claim, the plaintiff has pleaded as follows:

> 8.1 an action was taken out by the Defendant against Tham vide Kuala High Court Civil Suit No: S6–22–83–2005 ('the Civil Suit'). In the Civil Suit, the Defendant sought the following relief:
>
> (i) a declaration that the Defendant is the legal and beneficial owner of the Land;
>
> (ii) an order to set aside the transfer of the Land to Tham vide Presentation No. 19446/2004;
>
> (iii) an order directing the Registrar of the Land Office to do all that was necessary to remove the transfer of the land to Tham and to reinstate the Defendant as the registered proprietor of the Land.

8.2 Tham did not enter any appearance in the Civil Suit; and

8.3 On 26.9.2006, an order for leave to enter judgment was obtained by the Defendant against Tham in the Civil Suit and as a consequence a judgment in default was entered by the Defendant against Tham ('the JID').

9. On 30.3.2006, the Plaintiff filed an application to inter alia intervene and be made the 2nd Defendant in the Civil Suit, that the JID be set aside and an injunction to, inter alia, restrain the Defendant from transferring, selling and/or disposing Land pending the disposal of the Civil Suit ('the Plaintiff's Application'). Order in terms of the Plaintiff's Application was obtained from the Kuala Lumpur High Court on 2.10.2007 ('the Decision').

10. Dissatisfied with the Decision, the Defendant appealed to the Court of Appeal.

11. On 25.8.2009, the Court of Appeal allowed the Defendant's appeal and set aside the Decision. In this respect, the Plaintiff contends and will contend that the Defendant's appeal was allowed purely on a procedural ground in that the Kuala Lumpur High Court had no jurisdiction to give the Decision and/or was functus officio.

[8] The plaintiff pleaded in para 15 that he is a bona fide purchaser in good faith and for valuable consideration and that he has acquired a good title to the land. The plaintiff finally claimed under para 16 of his statement of claim for the following declaration and orders:

(1) A declaration that Tham Weng Hong hold the land as a bare trustee for the Plaintiff and that the Plaintiff is the beneficial owner of the Land;

(2) A declaration that the Plaintiff purchased the Land in good faith and for valuable consideration, and is entitled to be registered as the registered proprietor of the Land;

(3) An order that the JID on 26/9/2006 be set aside;

(4) An order that the Registrar's Caveat registered on 21.12.2004 vide Presentation No. 17400/2004 be removed by the Registrar of Title forthwith;

(5) An order that the private caveat registered on 12.10.2004 vide Presentation No. 14017/2004 be removed by the Registrar of Title forthwith;

(6) An order that the Registrar of Title pursuant to section 417 of the National Land Code 1965 registers the Plaintiff as the registered proprietor of the Land forthwith and to do all such things as may be necessary to give effect to the orders set out above or such other orders and/or judgment that this Honourable court may make;

(7) …

(8) …

[9] It is very patent from the plaintiff's pleadings that no cause of action has been disclosed as against the defendant over the land in question. The plaintiff's cause of action, if any, is against Tham with whom the plaintiff, according to his pleadings, he had entered into an agreement for the sale of the land.

[10] It would appear from the plaintiff's pleadings, read in its totality, the following facts are indisputable:

(a) that the defendant was the registered owner of the land at all material times;

(b) that the defendant had not transferred the land to Tham at any time; and

(c) that the defendant had not entered into any sale and purchase transaction with the plaintiff or with Tham.

[11] Since the plaintiff had pleaded in paras 14.2 and 8.3 of the statement of claim as follows:

> 14.2 the Plaintiff has no knowledge whatsoever of the alleged fraudulent acts of Tham or the particulars of fraud as pleaded by the Defendant in the Statement of Claim of the Civil Suit
>
> and
>
> 8.3 On 26.9.2006, an order for leave to enter judgment was obtained by the Defendant against Tham in the Civil Suit and as a consequence a judgment in default was entered by the Defendant against Tham ('the JID');

it was imperative for the plaintiff to have made Tham a co-defendant in this action.

[12] We are of the view that since the plaintiff has intentionally elected not to make Tham a party to the action, the plaintiff's claim to be a bona fide purchaser of the land from Tham, rings hollow and unbelievable.

[13] In the above circumstances, the plaintiff's claim for:

(a) a declaration that Tham Weng Hong hold the land as a bare trustee for the plaintiff and that the plaintiff is the beneficial owner of the land;

A (b) a declaration that the plaintiff purchased the land in good faith and for valuable consideration, and is entitled to be registered as the registered proprietor of the land;

(d) an order that the registrar's caveat registered on 21 December 2004 vide Presentation No 17400/2004 be removed by the registrar of title forthwith; and

B (e) an order that the private caveat registered on 12 October 2004 vide Presentation No 14017/2004 be removed by the registrar of title forthwith;

C is unsustainable.

[14] The plaintiff's further claim for:

(c) an order that the JID on 26 September 2006 be set aside;

D is clearly unsustainable as the judgment in default was in respect of the defendant's claim against Tham in the Kuala Lumpur High Court Civil Suit No S6–22–83 of 2005. It is for Tham to set aside the said judgment in default. It would appear that Tham to-date has not set aside the said judgment in E default.

[15] The HCJ was clear in his mind on the law in regard to a striking out application as can be seen in his detailed grounds of judgment. It is trite that only in plain and obvious cases that recourse should be had to the remedy of F striking out. The HCJ has neither erred in fact nor in law in striking out the plaintiff's claim.

[16] We reproduce below that part of his grounds of judgment which sets out G his reasons for allowing the defendant's application, and with which reasons and conclusion we are in complete agreement.

15. The plaintiff had previously taken steps to claim ownership of the land by his intervener application in the S6 Suit. However the COA in its decision of 25 August 2009 held in favour of the defendant, thereby shutting out H the plaintiff.

16. The plaintiff applied for leave to appeal to the Federal Court but withdrew its (his) application with no order as to costs.

17. The factual matrix discloses that there is neither privity nor legal relationship existing between the plaintiff and the defendant. There is I privity between the plaintiff and TWH vide the SPA entered into between them. As such the Plaintiff's cause of action, if any, lies against TWH and not the defendant. The plaintiff's rights against TWH are neither affected, diminished nor prejudiced by the decision in the S6 Suit. But the plaintiff's statement of claim does not disclose a cause of action against the

defendant. See *Government of Malaysia v Lim Kit Siang, United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12.

18. The judgment obtained by the defendant vide the 26 September 2006 order is a final judgment which has been drawn up and perfected. The COA held, inter alia, that the court was functus officio and therefore refused to grant an order setting aside the 26 September 2006 order. By doing so the COA was in effect affirming the defendant as the legal and beneficial owner of the land and not the plaintiff. The plaintiff now seeks from this court the very same order substantially that the COA could have but refused to grant. The doctrine of issue estoppel and res judicata are therefoe applicable. See *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 2 CLJ 783 at p 791.

19. The plaintiff is not a bona fide purchaser for value and has not shown to this court that he is. See *Au Meng Nam v Ung Yak Chew & Ors* [2007] 5 MLJ 136.

20. Related to the issue of bona fide purchaser is the factual and legal reality that TWH's fraudulent transfer, by means of forgery, of the land into his own name could not and did not convey any title, interests or rights unto him. As such the plaintiff consequently could not and did not derive any title from the purported transfer of the land to TWH, let alone better title than that of the defendant who is the legal and beneficial owner of the land because a forged instrument cannot and does not convey title to a subsequent purchaser. See *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 85H, *OCBC Bank (Malaysia) Bhd v Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 959 at p 962, *Elizabeth Chiew Yee Fung & Ors* [2001] 6 MLJ 403, *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 CLJ 269. And as regards the setting aside of a perfected judgment see also *Badiaddin bin Mahadin & Anor v Arab Malaysia Finance Bhd* [1998] 2 CLJ 75.

21. Based upon the above reasoning it is my decision that the plaintiff's claim is unsustainable thereby rendering it vexatious, scandalous and frivolous and an abuse of the court process. In short this is a plain and obvious case for striking out.

[17] Appeal dismissed with costs fixed at RM10,000. Deposit to the respondent to account of costs.

Appeal dismissed with costs and High Court's decision affirmed.

Reported by Ashok Kumar